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ATTORNEY FOR GVH, INC. and
THE FERBY CORPORATION

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE: §
§
STEPS AMERICA, INC. § CASE NO. 21-40065
§ (Chapter 11)
DEBTOR §

**MOTION FOR RELIEF FROM AUTOMATIC STAY AND
WAIVER OF THIRTY DAY HEARING REQUIREMENT**

Your rights may be affected by the relief sought in this pleading. You should read this pleading carefully and discuss it with your attorney, if you have one in this bankruptcy case. If you oppose the relief sought by this pleading, you must file a written objection, explaining the factual and/or legal basis for opposing the relief. No hearing will be conducted on this Motion unless a written objection is filed with the Clerk of the United States Bankruptcy Court and served upon the party filing this pleading **WITHIN FOURTEEN (14) DAYS FROM THE DATE OF SERVICE** shown in the certificate of service unless the Court shortens or extends the time for filing such objection. If no objection is timely served and filed, this pleading shall be deemed to be unopposed, and the Court may enter an order granting the relief sought. If an objection is filed and served in a timely manner, the Court will thereafter set a hearing with appropriate notice. If you fail to appear at the hearing, your objection may be stricken. The Court reserves the right to set a hearing on any matter.

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

COMES NOW, GVH, Inc. (“GVH” or “Landlord”) and The Ferby Corporation (“Ferby” or “Owner”), by and through their attorney Thomas L. Kapioltas and The Kapioltas Law Firm, PLLC, and moves this Court to modify the automatic stay to permit them to take possession of the commercial real estate commonly known as 4400 Preston Road, Frisco, Texas 75034 (“Premises”) and would show the Court as follows:

1. On January 15, 2021, Debtor filed a voluntary petition for relief under Chapter 11 of the United

States Code (“Code”).

2. Debtor continues to reside in the Premises as a Debtor and Debtor in Possession pursuant to Section 11 USC §§1107 and 1108 of the Code.

Background

3. Ferby is the Owner of the Premises and GVH acts as the Landlord for the Premises.
4. Debtor is engaged in the business of providing remodeling services from the Premises.
5. On October 1, 2015 Landlord, Owner and Debtor entered into the Commercial Lease Agreement (“Lease”) for the use and occupancy of the Premises. A copy of the Lease is attached as Exhibit 2.
6. Section 7.01 of the Lease states “Tenant has taken possession of the Premises and accepts the Premises in its “As Is” condition.”
7. Section 1.06 of the Lease provides that Tenant will pay “Monthly installments of \$10,400.00, plus triple net for the first twelve months (which includes the payment by the Tenant of real estate taxes (sic) (assessed by the City or County and assessment of bond payments and common area maintenance), then adjusted annually...”
8. Section 3.01 of the Lease provides that “During the Term, Tenant shall pay to Landlord in advance on the 3rd day of each calendar month, without deduction or offset, prior notice or demand...The Monthly Fixed Rent plus the CAM Expenses...collectively referred to herein as the “Rent.””
9. Debtor has failed to pay the full amount of the Rent and other charges for its use and occupancy of the Premises since failing to pay the December 2020 Rent payment.

10. On December 9, 2020 Landlord and Owner served on Debtor the *Notice of Vacate for Nonpayment of Rent*. Debtor failed to cure the default or vacate the Premises.

11. On December 17, 2020 Landlord and Owner filed their *Sworn Complaint for Forcible Detainer Commercial Lease – Nonpayment of Rent* as Cause No. 04-EV-20-01113 in the Justice

Court, Precinct 4, Collin County Texas (“Eviction”).

12. At the time of the filing of this Chapter 11 Bankruptcy, Debtor owed Landlord and Owner Rent for the months of December 2020 and January 2021 totaling **\$31,430.38** ((Rent \$14,286.54 + Late Fee \$1,428.65) * 2).

13. Since the filing of this Chapter 11 Bankruptcy, Debtor has failed to pay post-petition Rent for the months of February and March 2021 in the amount of **\$31,430.38** ((Rent \$14,286.54 + Late Fee \$1,428.65) * 2).

14. As of March 2020 Debtor has failed to pay Rent in the amount of \$57,146.16, Late Fees in the amount of \$5,714.60 (including all late fees for March), for a total amount of **\$62,860.76**.

15. Debtor brings this Chapter 11 Bankruptcy, meanwhile, Debtor remains in possession of the Premises, continues to fail to tender monthly Rent to Landlord and Owner, continues to fail to remediate the breach and default of the Lease, and continues to operate his business out of the Premises.

Debtor has failed to tender post-petition monthly Rent, testified at the 341 Meeting of the Creditors that it was going to continue to withhold Rent, lacks equity in the Premises, and the Premises is not necessary to an effective reorganization.

16. Under Section 365(d)(3) of the Code, a debtor has the duty, prior to the assumption or rejection of a lease of nonresidential real property, to make timely payment of the full rent due.

17. “The plain language of the statute is clear. Section 365(d)(3) provides for timely performance of all obligations of the debtor from and after the order for relief.” *In re Appletree Mkts., Inc.*, 139 B.R. 417, 421 (Bankr. S.D. Tex. 1992). Section 365(d)(3) “was added to the Bankruptcy Code in order to relieve landlords from the burden of proving that the rent payments they sought to collect from debtors prior to rejection were ‘actual and necessary’ costs of preserving the bankruptcy estate.” *In re Hitz Rest. Grp.*, 616 B.R. 374, 376 (Bankr. N.D. Ill. 2020) (quoting *In re Handy Andy Home Improvement Ctrs., Inc.*, 144 F.3d 1125, 1128 (7th Cir. 1998)). “The legislative history reflects congressional concern that lessors of nonresidential real property had

frequently been forced to extend credit to an estate during the time given for assumption or rejection of the lease. Id. (Citing *In re Telesphere Comm 'ns, Inc.*, B.R. 525, 529 (Bankkr. N.D. Ill. 1992).

18. Section 362(d)(1) of the Code provides that a court shall grant relief from the stay for cause, including the lack of adequate protection of an interest in property.

19. Section 362(d)(2)(a)(b) of the Code provides that a court shall grant relief from the stay if the Debtor has no equity in the Premises and the Premises is not necessary to an effective reorganization.

20. A court can grant relief from the stay for cause pursuant to Section 362(d)(1) of the Code for a debtor's failure to tender post-petition rent. *In re Consolidated Indus. Corp.*, 234 B.R. 84, 87 (U.S. Bankr., Northern Dist IL., 1999).

21. Pursuant to Section 365(d)(3) of the Code, Debtor has a duty to timely tender payment of post-petition monthly Rent.

22. To date, Debtor has failed to make any payments of post-petition monthly Rent and has testified that it will continue to refuse to make post-petition monthly Rent payment during the pendency of two lawsuits between Landlord, Owner and Debtor.

23. If Landlord and Owner are not legally permitted to proceed with the Eviction, to protect its interest in the Premises, it will suffer irreparable injury, loss, and damage. This Honorable Court can and should terminated the stay for cause pursuant to Section 362(d)(1) of the Code. *In re Consolidated Indus. Corp.*, 234 B.R. 84, 87 (U.S. Bankr., Northern Dist IL., 1999).

24. Landlord and Owner's action to regain possession is not prohibited by the automatic stay pursuant to Sections 362(d) of the Code because the Debtor has failed to make post-petition monthly Rent payments, has no equity in the Premises, and the Premises is not necessary to an effective reorganization.

25. By reason of the foregoing, an order should be entered modifying the automatic stay to permit Landlord and Owner to take possession of the Premises.

WHEREFORE, Landlord GVH, Inc. and Owner The Ferby Corporation, respectfully request that this Court grant it relief from the automatic stay in order to proceed with the Eviction for possession of the Premises, and awarding any other relief this Court deems just and equitable.

Respectfully,

THE KAPIOLTAS LAW FIRM, P.L.L.C.

/s/ *Tom Kapioltas*

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CERTIFICATE OF CONFERENCE

I certify that on March 5, 2021 I conferred with Eric Liepins, the Debtor's attorney, and he is opposed to the relief requested in this Motion.

CERTIFICATE OF SERVICE

I certify that on March 5, 2021, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Eastern District of Texas, Sherman Division or by U.S. first class mail.

/s/ *Tom Kapioltas*

Thomas L Kapioltas

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